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In the Supreme Court

OF THE

United States.

OCTOBER TERM, ~~1948~~ 1949

No. ~~[redacted]~~ 117

LOUISE M. WISSNER and LEANDROS H. WISSNER,

Appellants,

vs.

MARGARET WISSNER,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF APPELLEE FOR AFFIRMATION OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL.

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vs.

MARGARET WISSNER,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF APPELLEE FOR AFFIRMATION OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL.

At the outset it should be pointed out that the basis of this Court's jurisdiction by writ of certiorari is admitted in that the state court has decided a federal question of substance not heretofore determined by the Court.

There is a direct conflict between the state court and the Federal District Court sitting in the state

which is shown in the lower court's opinion (R. 33-4, 82-3, 89 A.C.A. 867-8, 201 Pac. (2d) 844) and is admitted by appellee both in his typewritten statement page 22, and Exhibit A of said statement.

Appellee seeks to deny the jurisdiction of this Court by appeal by claiming that the provisions of the federal statute relied on by appellants are not applicable. The lower court refused to follow appellee in this contention and not being able to avoid the clear meaning of the provisions of the federal statute the lower court held that they were unconstitutional under the Tenth Amendment and the due process clause of the Fifth Amendment of the United States Constitution.

Since appellee has not urged any ground for a dismissal of the appeal and an affirmance of the lower court's judgment short of a presentation of the case on the merits, it will be necessary for us to present the case on the merits to completely answer the motion.

SHORT STATEMENT OF FACTS AND ISSUES.

The case arises on a complaint of the plaintiff appellee to recover one-half the proceeds of a National Service Life Insurance policy from designated beneficiaries. Plaintiff's claim is based on the community property laws of the State of California, it being admitted that at all times during the marriage of plaintiff-appellee and her husband, Dr. Leonard O. Wissner that they were residents of the State of California and his salary under the laws of the State of Cali-

fornia was community property. Defendants-appellants are the mother and father of Dr. Wissner and are named the beneficiaries of his National Service Life Insurance policy. Under the laws of the State of California if this were a private insurance policy, the wife would be entitled to one-half of the proceeds, but defendants-appellants are receiving the proceeds of the policy from the Veterans Administration since they were the named beneficiaries of the policy and they claim the right to retain the proceeds received under the provisions of Section 3, 49 Statutes 609, 38 U.S.C.A. Section 454a Act of August 12, 1935, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

The lower court held that the United States did not have the power to provide that payments of the proceeds of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased assured based on the state community property laws (R. 31 and 79, 89 ACA 865, 201 Pac. (2d) 843) and awarded a judgment in favor of the widow and against the parents for one-half the payments received and to be received and gave the parents five days to remit after receipt. (R. 21, 31 and 80, 89 A.C.A. 865, 201 Pac. (2d) 843.)

Appellee in her motion to dismiss the appeal and affirm the judgment has not argued the question of power under the Tenth and Fifth Amendments and has repudiated the basis of the lower court's decision that the provisions of the federal act relied on by appellants is beyond the power of Congress under the Tenth and Fifth Amendments. (Point III Appellee's Statement p. 7.)

APPELLANTS CONTEND:

That among the powers expressly delegated to the Congress in Article I, Section 8 of the United States Constitution are the powers to "provide for the common defense and general welfare of the United States", to "raise and support armies", to "provide and maintain a Navy", to "make rules and regulations for the government and regulation of the land and naval forces", and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers".

That in the exercise of these powers the Congress has passed the "National Service Life Insurance Act" and the provisions of that Act, as amended, govern the designation of beneficiaries, the payment of insurance proceeds and the named beneficiaries' rights in the proceeds and being the supreme law of the land are not subject to and may not be controlled, modified or changed by the community property laws of the State of California.

Specifically we contend that the provisions of the federal act:

> "Payments made to * * * a beneficiary * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever * * *."

are a complete bar to appellee's claimed rights and require a reversal of the judgment of the lower court.

APPELLEE CONTENDS:

I.

That since appellants base their defense on the words of the federal statute "*AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever" that if any Court has touched payments made under veterans insurance either before or after receipt by the beneficiary by any process of any kind or character whatsoever that there is no federal question involved. (Statement p. 8, line 23, p. 9, line 8.)

II.

That the words "*AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary" are only intended to apply to creditors and that a wife seeking to enforce her vested rights in community property is not a creditor. (Appellee's typewritten Statement, pp. 13-14; p. 10, lines 4-6; p. 11, lines 11 to 12, line 3; p. 17, lines 10-13.)

III.

That community property laws have been applied to determine rights in the proceeds of a National Ser-

vice Life Insurance policy. (Appellee's typewritten Statement Point VI.)

IV.

That it is not "necessary and proper" in carrying out the intention of Congress to extend the language of the statute to defeat vested rights of a wife in community property. (Exhibit "A" pp. 7, 8, 17, 26, 31.)

V.

That the jurisdiction of federal district courts conferred by Section 617 of the National Service Life Insurance Act of 1940 as amended (38 U.S.C. Section 817) incorporating by reference Section 19 of the World War Veterans Act as amended (38 U.S.C. Section 455) indicates the intention of Congress to provide only for the litigation of disagreements as to whom the United States should make payments and that the federal cases construing the act are, therefore, not in point in a controversy between claimants of the proceeds of an insurance policy in an action in which the United States is not a party. (Appellee's typewritten Statement p. 5, lines 4-6, Exhibit "A".)

We shall attempt to answer appellee's contentions point by point and page by page and also the contention of the lower court that the case of *Cook v. Cook*, 65 Cal. App. (2d) 260, is authority for the lower court's holding.

OUR AFFIRMATIVE POSITION.

CONGRESS HAS THE POWER TO PROVIDE INSURANCE FOR THE MEMBERS OF THE ARMED FORCES AND THE FEDERAL ACT SHOWS THE INTENTION TO CREATE A COMPLETE AND UNIFORM SYSTEM.

This Court has said "If the act is within the power confided to Congress the Tenth Amendment by its terms has no application since it only reserves to the United States powers not delegated to the United States by the Constitution." *Everard's Breweries v. Day*, 265 U.S. 545, 558.

The United States Constitution, Article I, Section 8, grants to Congress the power to provide for the common defense and general welfare of the United States, to raise and support Armies, to provide and maintain a Navy, to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

In the exercise of these granted powers the Congress has passed the World War Veterans Act and the National Service Life Insurance Act which together show an intention by the Congress to provide a complete and uniform system of insurance for all members of the armed forces. As a part of this system it is provided that the insured shall have the right to name the beneficiaries and to change them at will;[1] that payments will be made to named beneficiaries

[1]Act of Oct. 8, 1940, Chapter 757, 54 Stat. 1009, as amended (38 U.S.C.A. Sec. 802-g), Appendix page viii.

only during the life of said beneficiaries;[2] that should no beneficiary be named that the proceeds of the insurance shall be paid to the estate of the deceased veteran[3] and that "payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".[4]

Other provisions of the National Service Life Insurance Act indicating a Congressional intent to provide a completely integrated Federal plan of insurance for members of the armed forces, to be administered on a National scale free from State jurisdiction or control, are (1) the provisions directing the Administrator of Veterans' Affairs to administer the Act and conferring authority to promulgate regulations for that purpose;[5] (2) the provision that the United States should bear the costs of administration;[6] (3) the provision that the United States should bear excess mortality costs and cost of waiver of premiums due to the extra hazards of military or naval service;[7] (4) the provision for a National Ser-

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[2]Sec. 602 I (38 U.S.C.A. Sec. 802 i), Appendix page xi.

[3]Sec. 602 J (38 U.S.C.A. Sec. 802 j), Appendix page xii.

[4]Act of August 12, 1936, Chap. 510, Sec. 3, 49 Stat. 609 as amended (38 U.S.C.A. Sec. 454a), Appendix page v.

[5]Sec. 608 (38 U.S.C.A. Sec. 808), Appendix page xvi.

[6]Sec. 606 (38 U.S.C.A. Sec. 806), Appendix page xiv.

[7]Sec. 607 (38 U.S.C.A. Sec. 807), Appendix page xiv.

vice Life Insurance appropriation for the payment of liabilities[8] and (5) the provisions for the creation in the Treasury Department of the National Service Life Insurance Trust fund and the setting aside of reserves to meet all liabilities.[9]

NATIONAL SERVICE LIFE INSURANCE CONTRACTS BEING AUTHORIZED BY ACT OF CONGRESS AND BEING CONTRACTS OF THE UNITED STATES ARE NOT SUBJECT TO STATE CONTROL

National Service Life Insurance contracts were authorized by the National Service Life Insurance Act, passed by Congress on October 8, 1940 (38 U.S.C.A., Sec. 801); the provisions of that Act, as amended, govern the designation of beneficiaries and payment of insurance proceeds thereunder, and are not subject to and may not be controlled, modified or changed by the community property laws of the State of California. *Barton v. United States*, 75 Fed. Supp. 703 (S.D. Calif.); *Johnson v. Shelton*, Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles) (Appendix pp. 16-20 Statement as to Jurisdiction). In the *Barton* case, the Court said (pp. 705, 706):

> "Whether state law can control disposition of proceeds of policies issued pursuant to the National Service Life Insurance Act of 1940, 38 U.S.C.A., Secs. 801-818, depends upon the intent of Congress; for it is clear that the Act, being a

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[8]Sec. 604 (38 U.S.C.A. Sec. 804), Appendix page xiii.
[9]Sec. 605 (38 U.S.C.A. Sec. 805), Appendix page xiii.

constitutional exercise of powers granted to Congress, * * * is "Supreme Law of the Land" * * * if Congress so willed. * * *

* * * * * * *

"I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A., Secs. 801-818. It follows then that California's community property law, (Cal. Civ. Code, Sec. 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.

"My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D.C., S.D. Cal. 1947. (Appendix C pp. 20-24 Statement as to Jurisdiction.)"

Also, as stated in *Johnson v. Shelton*, supra:

"In the case before us the policy of insurance was issued by the Federal Government pursuant to a Congressional act. To the extent then that any State law conflicts with this act of Congress it is of necessity void and of no effect. * * *"

Similar rulings have been rendered without opinions by United States District Judge Ben Harrison, in *James v. United States, et al.* No. 6061-BH, on June 16, 1947, (Appendix C pp. 20-24 Statement as to Jurisdiction) and also in *Pack v. Pack*, No. 7651 BH; by Judge Campbell E. Beaumont in *Rhodes v. United States, et al.* No. 5845-B, and by Judge Jacob Weinberger, in *Hayek v. Hayek v. United States*, No. 7400-W, all decided in the District Court of the

United States for the Southern District of California; and by the Superior Court of the State of California in and for the County of Los Angeles, in *Nobles v. Cannell*, No. 502-587 (Appendix p. xxiii herein). There are no Federal Court decisions to the contrary of which we are aware.

Government insurance contracts are contracts of the United States *(Lynch v. United States*, 292 U.S. 571), and their construction presents questions of Federal law not controlled by the law of any State. *Woodward v. United States*, 167 F. (2d) 774 (C.C.A. 8th); *Cassarello v. United States*, 271 Fed. 486 (M. D. Pa.), affirmed, 279 Fed. 396 (C.C.A. 3d); *United States v. County of Allegheny*, 322 U.S. 174, 183; *Clearfield Trust Co. v. United States*, 318 U.S. 363. As stated in *Woodward v. United States*, 167 Fed. (2d) 774:

> "Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. Lynch v. United States, 292 U.S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 87 L. Ed. 838; United States v. County of Allegheny, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209."

See also dicta in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 79.

FEDERAL LAW CONTROLS PAYMENT OF THE PROCEEDS OF A NATIONAL SERVICE LIFE INSURANCE POLICY.

Under the provisions of Section 602 (g) (38 U.S. C.A., Sec. 802 (g), the insured had the right to designate the beneficiary of his National Service Life Insurance contract within a restricted class of beneficiaries, and the right to change the beneficiary, without the beneficiary's consent. The section reads as follows:

> "(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: * * *"

This was one of the important provisions of the contract[10] which the insured entered into with the United States when he applied for National Service Life Insurance, and without any change having been made during his lifetime controls the payment of insurance benefits.

Under Government insurance contracts, the only relations of contract are between the Government and the insured, the beneficiary being a volunteer. *White*

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[10]The contract provisions are found in the Act, the amendments thereto and the regulations promulgated thereunder. *White v. United States*, 270 U. S. 175; *Lynch v. United States*, 292 U. S. 571; *Wilner v. United States*, 292 U. S. 571.

v. United States, 270 U.S. 175 supra; *Von Der Lippi-Lipski v. United States*, 4 F. (2d) 168 (App. D.C.) infra; *United States v. Sterling*, 12 F. (2d) 921 (C.C.A. 2) infra. As stated in *White v. United States*, supra (pp. 180-181):

> "The only relations of contract were between the Government and him. White's mother's interest at his death *was vested* only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See Helmholz v. United States, 294 Fed. 422, affirming 290 Fed. 614. (Emphasis ours.)

Appellee, who admittedly was not designated as beneficiary, had no relations of contract with the Government and could occupy no better position than the named beneficiary.

So in *Washburn v. United States*, 63 Fed. Supp. 224 where the proceeds were payable to the wife as primary beneficiary and the sister of the insured as contingent beneficiary and the wife died leaving a son shortly after the insured died the Court said:

> "It will not be disputed, I am sure, that it is a well established principle of law that where a beneficiary survives the insured, however short the length of time may be between the death of the insured and that of the beneficiary, the rights of a 'contingent' beneficiary are lost, and that upon the death of the insured, the benefits immediately become due to the surviving principal beneficiary. (Citing cases.)

"With that principle of law in mind, if the facts in this case had arisen under an ordinary life insurance policy, there could be no question but that immediately upon the death of the insured, the right to the insurance would have vested in the 'principal' beneficiary, his wife, and that the 'contingent' beneficiary would have acquired no interest in the benefits, *but in this case the insurance was provided for by a special Act of Congress, for those in the Armed Forces, and we must find the answers to our questions within the Act itself.*" (Italics ours.)

The Court then holds that the sister, the "contingent" beneficiary, is entitled to the insurance in spite of the state rule of law to the contrary.

Similarly a state court consent decree is invalid as a violation of the federal act prohibiting assignments *Robertson v. McSpadden,* 46 Fed. (2d) 702. An agreement to divide the proceeds is invalid. *Bradley v. United States,* 43 Fed. (2d) 573. An agreement not to change beneficiaries is invalid. *Von Der Lippi-Lipski v. United States,* 4 Fed. (2d) 168; *Lewis v. United States,* 56 Fed. (2d) 563; *Murphy v. United States,* 5 Fed. Supp. 583, where the Court said:

"(3) Plaintiff's second ground of recovery appears to resolve itself into a *pure question of law.* He testified that, after his son's term insurance had expired for the non-payment of premiums, he furnished money for it to be reinstated, and that he had paid the premiums on the life insurance policy since it was issued. There is conflicting testimony as to whether or not such was the fact. It is not necessary for me to make a finding one

way or the other in order to determine plaintiff's right in this case. Whether or not the father may *prove a claim against his son's estate* for money so expended is a question for the state Court. *An agreement not to change beneficiary in a war risk policy in consideration of money advanced to insured by beneficiary is invalid.*"

A gift of the policy followed by payment of the premiums by the donee does not prevent a change in beneficiary by the insured and the new beneficiary is entitled to the proceeds as against the donee. *United States v. Sterling,* 12 Fed. (2d) 921; *Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890.

FEDERAL LAW PROTECTS THE NAMED BENEFICIARY IN THE USE OF THE PROCEEDS ALTHOUGH STATE RULES OF LAW WOULD AUTHORIZE OTHERS TO TAKE THE PROCEEDS FROM THE NAMED BENEFICIARY.

The provisions of the federal act directly involved in this case are found in Section 3, 49 Statutes 609, 38 U.S.C.A., Section 454 A, Act of August 12, 1934, Chapter 510:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, AND shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

The provisions of this section against assignments have been upheld in *Robertson v. McSpadden*, supra; *Bradley v. United States*, supra; *Von Der Lippi-Lipski v. United States*, supra; *Lewis v. United States*, supra; *Murphy v. United States*, supra; *United States v. Sterling*, supra; *Tompkins v. Tompkins*, supra.

The provisions of this section exempting the proceeds from taxation were upheld in *Lawrence v. Shaw*, 300 U.S. 245 and considered not applicable to the situation presented in *United States Trust Co. of New York v. Helvering*, 307 U.S. 57.

The exception from the claims of creditors was followed in *Culp v. Webster*, 25 Cal. App. (2d) Supp. 759, 70 P. (2d) 273. In *Pagel v. Pagel*, 291 U.S. 473 it was held under the previous wording of this section that this exemption did not extend to the funds after they became a part of the estate of the assured and the Congress immediately thereafter broadened the language to cover that situation. *In re McCormick's Estate*, 8 N.Y.S. (2d) 179, 185-188, *Haley v. United States*, 46 F. Supp. 4, 7.

As Appellee points out in her Statement, lower courts have applied proceeds to the payment of claims for alimony, *Hannah v. Hannah*, 11 S.E. (2d) 779, 781, and *Stirgus v. Stirgus*, 160 S. 285 and have approved similar payments made by a guardian of a veteran unable to act for himself, *Gaskins v. Security Bank*, 30 Cal. App. (2d) 409, 85 Pac. (2d) 681, 685, *Guardianship of Giambastini*, 1 Cal. App. (2d) 639, 37 Pac. (2d) 142, *In re Flanagan*, 31 Fed. Supp. 402.

There are decisions contra e.g. *Brewer v. Brewer*, 19 Tenn. App. 209, 84 S.W. (2d) 1022, *Maddox v. Elliott*, 248 Ala. 271, 27 So. (2d) 498, 499, *Riker v. Riker*, 160 Misc. 117, 289 N.Y.S. 835 decided under the similar wording of the Act of Jan. 27, 1936, c. 32, Sec. 4, 49 Stat. 1101 (38 U.S.C.A. 686 c) (Appendix page vii).

In whatever manner this Court may resolve this conflict when the question is presented, as it undoubtedly will be at some time, it is not necessary to resolve it in the case at bar. We are concerned with the right of the insured to name the beneficiary in the policy on his life and of that beneficiary's right to retain the proceeds paid to her. The question of support for a wife or children is not involved.

Cases "on all fours" with the case at bar except that rights in community property are not involved are *United States v. Sterling*, 12 Fed. (2d) 921 (supra) and *Tompkins v. Tompkins*, 132 N.J.L. 217, 38 Atl. (2d) 890 (supra). The opinions are short—please read them.

In addition there is the unbroken line of cases decided by the federal district courts in California and the case of *Johnson v. Shelton* decided by Judge Clarence M. Hanson of the Superior Court of the City and County of Los Angeles since the publishing of the opinion of the lower court in the present case. (Pages 17-18 Statement as to Jurisdiction and pages 9-10, 22 and 30 herein.) And the case of *Nobles v. Cannell*, supra (Appendix page xxiii.)

OUR POINT BY POINT AND PAGE BY PAGE ANSWER TO APPELLEE'S CONTENTIONS.

THIS COURT HAS JURISDICTION BY APPEAL BECAUSE APPELLANTS BASED THEIR DEFENSE ON THE PROVISIONS OF A FEDERAL STATUTE WHICH THE LOWER COURT REFUSED TO APPLY ON THE GROUND THAT THEY WERE UNCONSTITUTIONAL.

We agree with appellee that there is no federal question involved if Section 3, 49 Statute 609, 38 U.S. C.A., Sec. 454a, Act of August 12, 1935, Chapter 510 is not applicable. The lower court held that the federal government *did not have the power* to provide that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of the State of California to one half of the payments *after* their receipt by the mother of the insured. (R. 31 and 79, 89 ACA 865, 201 Pac. (2d) 843.)

The act provides:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." (Emphasis ours.)

The intent of the Congress in using this language if it is not clear will be derived from the rest of the statutes on this subject and the history of the statute.

In other parts of the statute the insured is given the right to name the beneficiaries and to change them

at will within certain classes. Following the case of *Pagel v. Pagel*, 291 U.S. 473, a further extension of the exemptions was made to include the estate of the insured. The clear intention of the Congress was to give the insured the right to say who should receive the proceeds of his insurance and to protect that person in the use of the proceeds against any possible claim.

Under the well known rule of statutory construction every word and phrase must be given some useful meaning if that is possible. When the statute says that "payments made to a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever", the words "*AND* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever" add new exemptions to the exemptions from taxation and the claims of creditors already stated.

Congress intended a veteran to have the right to say to whom the proceeds of his insurance should be paid and that that person should be able to use those proceeds free from taxation, free from the claims of creditors *AND* free from the claims of any other person such as a wife he may have already fully provided for.

The only claims that could be made against proceeds of an insurance policy are claims of the state by taxation, claims of creditors AND claims of relative by blood or marriage. The Congress said that none of

these claims could be asserted either before or *after* receipt of the payments by the beneficiary.

Appellee in her Memorandum of Respondent's Oral Argument, Exhibit A, to her Statement, pages 13 and 33, contended that there was no actual conflict between provisions of the federal act and the state statute. Mrs. Justice Adams speaking for the Court below repudiated this contention and in upholding the California community property law held the provisions of the federal statute unconstitutional. She would not have done this if the meaning of the federal act was not clear and clearly in conflict with the state statute.

Appellee contends (pages 8 and 9 of her statement) that there is no federal question involved unless appellant can show that the provisions of the federal statute "mean that no Court can touch payments made under veterans' insurance either before or after receipt by the beneficiary by any process of any kind or character whatsoever." Having set up this straw man she proceeds to knock it down.

All appellants must show, of course, is that the federal statute was intended to protect them and that the lower court has refused to apply it. The lower court not only refused to apply it in accordance with its clear terms but said the provisions relied upon were unconstitutional. Such a holding gives this Court jurisdiction by appeal under the provisions of Title 28 United States Code, Section 1257 (1).

> "Final judgments or decrees rendered by the highest court of a state in which a decision could

be had may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity."

Appellee insists on pages 15 et seq. of her typewritten statement that this Court limits the provisions of section 454a in the case of *United States Trust Company of New York v. Helvering*, 307 U.S. 57, supra, when she is still in the process of knocking down the straw man that she has set up—the argument that there is no federal question involved if any Court at any time has held that payments made under veteran's insurance can be touched by any process of any kind or character whatsoever. She then on page 21 of her typewritten statement in discussing the case of *Lawrence v. Shaw*, 300 U.S. 245 fails "to see that this case applies to any of the present issues."

Both cases concern themselves with the exemption in the statute relied upon by appellants which apply to taxation. In the *Helvering* case this Court held that the $10,000.00 of federal life insurance should be counted in determining the federal estate tax. This was based on the well established principle that the federal estate tax is on the transfer and not on the property.

In *Lawrence v. Shaw*, 300 U.S. 245, Chief Justice Hughes applied the provisions of the federal act on which appellants rely and held that North Carolina could not tax the proceeds of a government life insurance policy even after the checks had been collected

and the proceeds deposited in a bank by the guardian of a veteran.

Lawrence v. Shaw was cited to the state courts for the proposition that federal rules of law control and must be applied in their field and not state rules in conflict therewith.

It was further cited on the proposition that the constitutionality of the very section of the statute relied upon by appellants had been upheld although in conflict with a statute tax statute. The *Lawrence* case is relied on in *Barton v. United States,* 75 Fed. Supp. 703, supra, and *Johnson v. Shelton* (R. 85-89), supra, both of which were cited to state courts. In spite of appellee's statement we believe that both of these cases are correct expositions of the statute upon which we rely and that both cases must be considered in determining the meaning of Section 454a and its application to the case at bar.

Is our case more analogous to the *Helvering* case involving another federal statute or more analogous to the *Lawrence* case involving a state statute? When this Court finds a conflict between two federal statutes it can resolve that conflict and determine the intent of the Congress by applying the doctrine of repeal by implication or the doctrine of general or specific laws, or some other rule of construction. When there is a conflict between state and federal statutes the state statute must fall because of the supremacy clause of the United States Constitution.

When this Court in the *Helvering* case says 454a does not prevent the taxing of a transfer it is con-

struing the provisions of the taxing statute and the exemption statute and finding no conflict. In the *Lawrence* case it finds a direct conflict and upholds the exemption statute. The lower court in the case at bar construes the exemption statute and the state statutes as being in direct conflict and says that the federal exemption statute is unconstitutional. *Lawrence v. Shaw* is therefore directly in point and appellee's failure to see its applicability is an example of extreme myopia.

A WIFE SEEKING ALIMONY OR SUPPORT FOR THE CHILDREN MAY NOT BE A CREDITOR BUT A WIFE SEEKING ONE-HALF THE PROCEEDS OF A NATIONAL SERVICE LIFE INSURANCE POLICY FROM A DESIGNATED BENEFICIARY AFTER HER HUSBAND'S DEATH IS BARRED BY THE PROVISIONS OF THE FEDERAL STATUTE.

As an original proposition and in the absence of a decision by this Court, and there is none, we would argue that the provisions of the act relied upon by appellants would exempt payments made to a beneficiary from claims for support money, alimony and child care. We would argue that *Hannah v. Hannah,* 11 S.E. (2d) 779, 781, supra, and *Stirgus v. Stirgus,* 160 S. 285, supra, are incorrectly decided. Compare *United States v. Sterling,* 12 Fed. (2d) 921, supra, *and Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890, supra, which are much closer analogies to the case at bar.

The cases of *Gaskins v. Security Bank,* 30 C.A. (2d) 409, 85 Pac. (2d) 681, 685, supra, *In re Flanagan,* 31

Fed. Sup. 402, supra and *Guardianship of Giambastioni*, 1 Cal. App. (2d) 639 (37 Pac. (2d) 142), supra, all involve payments made on behalf of a veteran incapable of acting for himself. The Courts in these cases would be justified in assuming that the veteran, were he in possession of his faculties, would have made these payments himself. The veteran in our case was in possession of his faculties. He knew that his wife was provided for even better than he desired and he wanted his parents to receive the proceeds of his insurance policy. Instead of carrying out the veteran's wishes and the plain terms of his contract with the United States, the lower court is making them a mockery.

The case of *Schlaefer v. Schlaefer*, 112 Fed. (2d) 177 is an excellent illustration of the difference in statutes that are almost alike. It appeared that the defendant navy officer was receiving disability payments from the United States. He was also receiving disability payments from a private insurance company. The act exempting payments made by the private insurance company exempted them *from the payment of any debt or liability*. Judge Rutledge said: "The obligation on which appellant's claim is based is not a 'debt' or a 'liability' in the ordinary usages of those terms. It is a duty of higher obligation." As has been said, it is not one within the usual purposes of exemption statutes.

The payments made to the defendant, Schlaefer, by the United States were not involved. It may have been that they were not attached because the statute applying to them provided:

> "Payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, AND shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

The exemptions of the federal act applying to payments by the United States are so much broader than the exemptions applying to payments by private insurance companies that it is far from certain that a similar result would be reached by Justice Rutledge in a case involving alimony payments and even if the result would be the same in such a case it would not be determinative of the case at bar. We are determining the right of a deceased veteran to leave the proceeds of his insurance to his mother rather than to his widow who has already received half of his estate and property left in joint tenancy.[11]

Appellee did not attempt to reach the proceeds under any theory of need. She claimed a vested right in one half the proceeds. (Appellee's Statement pp. 13-15, 17.) The lower court (R. 29, 77, 89 A.C.A. 863, 201 Pac. (2d) 842) refers to the wife's rights to the earnings of her husband during marriage as vested

[11]The trial court held that this was immaterial and refused to permit the introduction of this evidence. No assignment of error was made on this point and the record on it is not presented because the alimony and child support cases were never referred to by either side or by any state court at any stage of the proceedings below. We do not believe that the Congress intended that the right of a veteran to name his mother beneficiary of his insurance policy should or can be affected in any way by the question of whether or not he will thereby leave his widow in comfortable or necessitous circumstances.

rights. This Court speaking through Justice Holmes in *White v. United States*, 270 U.S. 175, 180, supra, said:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In *Von Der Lippi-Lipski v. U. S.*, 4 Fed. (2d) 168 supra, the Court said:

> "It has been held repeatedly that a beneficiary under such a contract of insurance did not have a vested interest in installments of insurance not accrued, and that such contract is not an ordinary contract of insurance, nor is it in the nature of a pension, but is rather of the character and nature of both. *It has also been held that the authority of the insured, expressly conferred by statute, to designate whomsoever he desired, within the permitted class, as beneficiary under such con-*

tract of insurance was effective, when exercised by the insured, as against those who would otherwise have been entitled to benefits thereunder." (Italics ours.)

In *Sizemore v. Sizemore's Guardian*, 222 Ky. 713, 2 S.W. (2d) 395, the Court said:

(2) "It is insisted upon this appeal that the amendment to the statute after the death of the soldier violated the Fifth Amendment to the Constitution of the United States, in that it deprived appellant of her property without due process of law. The argument proceeds upon the theory that the designated beneficiary had a vested right to all of the insurance, which could not be affected by later legislation. The argument is unsound. The beneficiary has no vested right in the installments not due or paid. His right to receive further installments ended at the death of the beneficiary, and *Congress possessed the power to provide where the insurance money should go in every contingency. The interest of the beneficiary was vested only so far as the soldier and the government had made it so, and was subject to any conditions, upon which they might agree. Congress, in creating the right, could annex conditions, and the beneficiary took the right subject to the conditions.* White v. U. S., 270 U.S. 175, 46 S.Ct. 274, 70 L. Ed. 530 annotated; Helmholz v. Horst (C.C.A.), 294 F. 417; Cassarello v. U. S. (D.C.), 271 F. 486, affirmed (C.C.A.) 279 F. 396; Gilman v. U. S. (D.C.), 300 F. 764, affirmed (C.C.A.) 300 F. 767; Sutton's Ex'r. v. Barr's Adm'r, 219 Ky. 543, 293 S.W. 1075." (Italics ours.)

In *United States v. Sterling,* 12 Fed. (2d) 921, supra, the wife paid all the premiums after a gift of the policy to her by her husband. He made a false affidavit that the policy was lost, designated new beneficiaries, his parents, and the new beneficiaries are held to be entitled to the proceeds. A similar case is *Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890 supra.

If these claimed vested rights illustrated by the last five cited cases, must fade as a snowball under a July sun when the provisions of the federal act are applied, what does it avail to call the rights of a wife in the earnings of her husband a vested right? How can they withstand the intent of the deceased soldier and the compact between that soldier and his government? To paraphrase the wording of Chief Justice Holmes in *White v. United States,* supra: Major Wissner and his government had made a contract which cut his wife's rights down to nothing. The Congress which has been given the power to "provide for the common defense and general welfare of the United States", to "raise and support Armies", to "Provide and maintain a Navy", to make rules and regulations for the government and regulation of the land and naval forces, and to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers", intended to give to Major Wissner the right to designate who should receive the proceeds of his insurance and to insure the beneficiary so designated the right to use the proceeds without interference. Major Wissner

has expressed his intention that his mother and father should receive and use these proceeds to the complete exclusion of his widow. His government has contracted to carry out the Major's wishes. The contract is expressed in an act of the Congress which is the supreme law of the land and the judges in every state, including California, are bound thereby.

NO REPORTED CASE AGREES WITH THE COURT BELOW IN HOLDING THAT STATE COMMUNITY PROPERTY LAWS CAN BE APPLIED WHEN IN CONFLICT WITH THE PROVISIONS OF THE FEDERAL STATUTE.

So far as we are informed the first case "on all fours" with the case at bar is the case of *Cora Belle Bennett v. Modesta Lee Bennett,* No. 503386, Los Angeles Superior Court. In this case Judge Myron Westover on March 20, 1946, held that the wife was entitled to recover her community half of the proceeds of an insurance policy on her deceased husband's life from her mother-in-law, the named beneficiary. This case was followed on the trial by Judge B. C. Hawkins in the case at bar.

Before the case at bar had been argued before the District Court of Appeal, Third Appellate District, Judge Harrison in the Federal District Court for the Southern District of California in the case of *James v. United States et al.,* No. 6061-B H findings and conclusions printed as Appendix C to our Statement as to Jurisdiction (R. 89-93) and Judge Mathes in *Barton v. United States,* No. 5527-WM (S.C.Dal.)

75 Fed. Supp. 703 had both held to the contrary. Mrs. Justice Adams in the case at bar expressly disagreed with the *Barton* case. (R. 33-34, 82-83, 89 A.C.A. 867-8, 201 Pac. (2d) 844.) In the meantime on May 31, 1946, Judge Ben V. Curler, of the Los Angeles Superior Court in *Nobles v. Cannell,* No. 502587 had held that the wife was entitled to recover her community half of the payments under the policy from the beneficiary and on October 27, 1948, reversed himself and held that the provisions of the federal act controlled. (R. 68-69 and Appendix page xxii herein.)

Following the publishing of the opinion in the instant case Judge Clarence M. Hanson of the Los Angeles Superior Court in *Johnson v. Shelton,* No. 522,648 expressly disagreed with the opinion of Mrs. Justice Adams speaking for the Court in the case at bar. (R. 85-89.) New cases are being filed and the state Courts are in hopeless confusion. The judges in the federal district courts have without exception, however, held that the provisions of the federal statute relied on by appellants are controlling and the state statutes in conflict therewith are inapplicable.

The cases of *United States v. Robinson,* 40 Fed. (2d) 14, *Succession of Lynch v. United States,* 17 Fed. Supp. 674; *United States v. Primilton,* 76 Fed. (2d) 555; *United States v. Rose,* 57 S.W. (2d) 350 and *Succession of Jones* (La.), 169 S. 440 relied upon by appellee have no bearing on the problem involved in our case. They all discuss the question involved in *Singleton v. Cheek,* 284 U.S. 493.

When the federal act says that in the absence of a designation of a beneficiary that the proceeds of a deceased soldier's insurance shall be paid into his estate to be distributed as the personal property of the assured,[12] of course, the state laws applying to community property can be applied. There is no conflict between the provisions of the federal statute and the state rules of descent and distribution. The federal act says that the proceeds shall be paid into the veteran's estate and leaves its further distribution open. This requires further distribution to be determined by the state rules.

In the instant case the deceased soldier has designated a beneficiary and the federal act says that the proceeds in the beneficiary's hands shall not be touched by any legal or equitable process whatever. In the cases cited by appellee the state rules of law are applied to a situation not covered by federal rules and after the federal rules in regard to payment have been fully complied with. In the instant case it is sought to apply state rules in direct conflict with the federal rules and to a situation expressly covered by the federal rules. The federal rules being the supreme law of the land the state rules in conflict therewith are void.

Appellee on pages 21 and 22 of her typewritten statement in her discussion of *Lewis v. United States*, 56 Fed. (2d) 563 (supra), and *United States v. Sterling*, 12 Fed. (2d) 92 (supra) and her statement that

[12]Act of June 7, 1924, Chapter 320, Sec. 303, 43 Stat. 625, as amended, 38 U.S.C.A. Sec. 514, Appendix page vi.

we have cited approximately fifty cases without discussing any of them and that she analyzed them when they were cited to the California Courts and is convinced that they are lacking in discussion of the one principal point involved in this matter and that the United States is not a party to this action and that this court should leave controversies of this type to state courts (p. 25) is trying to avoid a decision by this Court which she knows must result in a reversal of the judgment of the lower court. It will be a decision on a novel question so far as this Court is concerned, in a matter of great importance to veterans of the eleven community property states.

In the state courts we analyzed and discussed, among others, twenty-two of the cases cited to this Court in our Statement as to Jurisdiction. The lower court brushed our arguments aside in the following language:

> "Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton v. United States, D.C., 75 F. Supp. 702, in which a widow of a deceased veteran applied to the Administrator of Veterans'

Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this Court; and we think it is clearly distinguishable in so far as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that Court decided that because of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case." (R. 33-34, and 82-83, 89 A.C.A. (2d) 867-8, 201 Pac. (2d) 844.)

The *Barton* case was the only one "on all fours" that had been reported at that time and the only reasons stated by the Court below for not following it were: (1) That the decision of the federal court was not conclusive on the state court and (2) The *Barton* case was decided by the federal court after a claim had been presented to the Administrator of Veterans' Affairs who had pursuant to the terms of the contract properly disallowed it.

At the hearing in the lower court counsel for appellee devoted his entire attention to the *Barton* case and by permission of the Court reiterated his argument and filed it in written form Exhibit "A" of appellee's typewritten statement after the argument.

This Memorandum was so successful when used twice before the same Court below that appellee confidently expects the same result in this Court by reiteration of his same arguments. The Court below, however, repudiated appellee's main contentions and decided the case on a different basis and on the authority of cases not cited by appellee nor cited in cases cited by either side.

Before discussing appellee's Exhibit "A" or the lower court's opinion further we refer to the case of *Lewis v. United States,* 56 Fed. (2d) 563. We cited this case in our Statement as to Jurisdiction as an example of a case involving the proceeds of government insurance where the Court applied the rules of the federal statute rather than state rules in conflict therewith. Appellee on page 21 of her typewritten statement says that the Court applied local law. The

fact is that the Court applied local law to determine the questions stated by appellee. There was no federal rule in conflict with local law on those matters. The first question passed on by the Court, however, was the effect of a claimed agreement by the insured not to change the beneficiary and the fact that a consideration had been given by the first named beneficiary, the insured's aunt, for this agreement. This would have amounted to an irrevocable assignment of all rights in the policy under local law if properly made. (*Tompkins v. Tompkins,* supra, and cases cited therein.) The trial court refused to admit evidence on the matter, however, because the federal act gave the veteran the right to change the beneficiary at any time without the consent of the beneficiary.

Appellee on page 22 of her typewritten Statement in discussing the case of *United States v. Sterling,* 12 Fed. (2d) 921, supra, says:

> "The court held that no agreement could defeat insured's right to change beneficiary (which we agree with)."

This is a right given the assured by the federal act. Similarly he is given the right by the federal act to designate his mother the beneficiary of his policy in preference to his wife and he is assured by his government that the beneficiary he names will be protected in the use of the proceeds once she receives them.

United States v. Sterling, if correctly decided, is determinative of the issues in the case at bar. The wife was given the policy and paid all the premiums

on it personally and nevertheless the veteran was allowed to change the beneficiary and the new beneficiary was allowed to collect and keep the proceeds. The wife's own money used in paying the premiums is certainly as vested as a wife's community property interest in a husband's salary paid to him by his government as a Major, U. S. Army on duty in India.

The only distinctions between the *Sterling* case and the case at bar that appellee can suggest are that the United States was a party in the *Sterling* case and the point before the Court was specifically covered by the contract and the federal statute. We will discuss hereafter the question of the United States being a party. The question before the Court in the case at bar is specifically covered by the contract and the federal statute.

We also cited the case of *Tompkins v. Tompkins*, 132 N. J. L. 217, 38 Atl. (2d) 890, supra. The United States was not a party in that case. The rights of the wife were as vested as they can be in this type of property (which is not at all) and the right of the veteran to change beneficiary and the right of the new beneficiary to receive and use the proceeds under the provisions of the federal statute are recognized.

THE NECESSARY AND PROPER CLAUSE OF THE FEDERAL CONSTITUTION IS A GRANT OF POWER—NOT A LIMITATION ON EXPRESSED POWERS—AND THE COURTS LEAVE TO THE CONGRESS THE QUESTIONS OF PROPRIETY, WISDOM, NECESSITY, UTILITY AND EXPEDIENCY OF LEGISLATION WITHIN ITS EXPRESSLY DELEGATED POWERS.

It was contended by appellee before the lower court:

> "That in order to sustain Judge Mathes' decision (Barton case) it must appear first, that Congress intended to destroy the community property rights of California women, and second, that such destruction was 'necessary and proper' for carrying into execution the insurance program". (Appellee's typewritten Statement Exhibit "A" p. 7.)

The necessary and proper clause of the United States Constitution was also referred to as a limitation on the power of the Congress at pages 8, 17, 26 and 31 of Exhibit "A". The lower court did not discuss this matter, apparently accepting the presentation we made in Appellants' Answer To Memorandum Of Respondents' Oral Argument. Appellee-respondent repeats her argument in spite of its repudiation by the lower court.

We believe that the propositions of law stated in this point are so elementary, so firmly established and so fresh and clear to this Court that a few general statements of annotaters and text writers will suffice.

In the note to Article I, Section 8, Clause 18 of the United States Constitution in U.S.C.A. beginning on page 449 is the following:

> "2. Discretion as to means employed.—In the gift by the Constitution to Congress of authority

to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Legal Tender Cases (Tex., Mass. 1871) 12 Wall. 538, 20 L. Ed. 287. See, also, Matter of Jackson (C.C.N.Y. 1877) 14 Blatchf. (U.S.) 245, 13 Fed. Cas. No. 7, -124, petition for writ of habeas corpus denied (1878) 96 U.S. 727, 24 L. Ed. 877, and see Page v. U. S. (C.C.A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U.S. 627, 66 L. Ed. 799, holding that Congress had implied power to enact laws for the enforcement of the Eighteenth Amendment.

"Congress has a large discretion as to the means to be employed in the exercise of any power granted to it. Northern Securities Co. v. U. S. (Minn. 1904) 193 U.S. 343, 24 S. Ct. 436, 48 L. Ed. 679. See, also, Fairbank v. U. S. (Minn. 1901) 181 U.S. 287, 21 S. Ct. 648, 45 L. Ed. 862; Levin v. U. S. (C.C.A. Mo. 1904) 128 F. 826, 827.

"Federalist.—This clause is 'only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. * * * A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and caluminated provision in question do more than

declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and *to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union.* The convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to ques-

tion the great and essential truth which it is manifestly the object of the provision to declare."

Hamilton, in *The Federalist*, No. XXXIII:

"Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper. Ex parte Curtis (N.Y. 1882) 106 U.S. 371, 1 S. Ct. 381, 27 L. Ed. 232."

On this subject, 11 *American Jurisprudence*, Section 138 of Constitutional Law, beginning at page 804 reads as follows:

"One of the most firmly established groups of principles which has become cardinal and elementary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people, * * *."

THE DECISION OF A FEDERAL COURT CONSTRUING AN ACT OF CONGRESS CLAIMED TO BE IN CONFLICT WITH STATE RULES OF LAW IS ENTITLED TO AS MUCH WEIGHT AS THE DECISION OF A STATE COURT ON THE SAME MATTER.

Appellee and the lower court have attempted to distinguish the case at bar from *Barton v. United States*, 75 Fed. Supp. 703, supra and the large number of other cases cited by appellants on the ground that the

federal courts were only deciding a controversy under Section 817 of the National Service Life Insurance Act of 1940[13] as amended (38 U.S.C. Sec. 817) incorporating by reference Section 19 of the World War Veterans Act as amended (38 U.S.C. Sec. 455).[14]

In addition to *Culp v. Webster*, supra and *Johnson v. Shelton*, supra, from California, we cited *Lawrence v. Shaw*, supra, *Sizemore v. Sizemore's Guardian et al.*, 222 Ky. 713, 2 S.W. (2d) 395, 396-7, *Sutton's Ex'r v. Barr's Adm'r*, 219 Ky. 543, 293 S.W. 1075, *Maddox v. Elliott*, supra, and *Tompkins v. Tompkins*, supra, all arising in State Courts and all cases upholding the provisions of the federal act and all cases in which the United States was *not* a party.

Most of the cases have arisen in Federal Courts, however, and in most of the cases the United States was a party. The reason is not far to seek. If a claimant of the proceeds of life insurance can get a judgment against the United States which is paying the money, he is much better off than he would be if his judgment only ran against the named beneficiary who was receiving the money from the United States. So in the case at bar the United States will continue to pay appellants the moneys called for by the insurance contract with their deceased son.

In the cases decided in Federal Courts all claimants of the proceeds are permitted to intervene and a decision by those Courts is final.

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[13]Act of Oct. 8, 1940, Chap. 757, Title 6, Part 1, Sec. 817, 54 Stat. 1014, Appendix page xvii.

[14]Act of June 7, 1924, Chap. 320, Sec. 19, 43 Stat. 612, as amended (38 U.S.C.A. Sec. 445), Appendix page i.

In deciding the controversy before it the Federal Court applies the same rules of law that the State Court of the state where the Federal Court sits should apply.

The principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 are binding on the Federal Court and the supremacy clause of the United States Constitution is binding on the State Court. As a matter of comity the first court to decide the question should follow the other unless clearly in error and when such a conflict occurs the only recourse is by appealing to this Court.

Chief Justice Marshall said:

> "* * * The People of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, any-

thing in the laws of any state to the contrary notwithstanding." (*McCulloch v. Maryland*, 4 Wheaton, 316.)

"THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT[15] * * *" "THE JUDICIAL POWER SHALL EXTEND TO ALL CASES, IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES[16] * * *"

The Supreme Court of the United States is interested in controversies between citizens of the United States which involve their rights under the federal constitution. It is not a mere adjunct of the federal government created to carry out and enforce federal laws in cases in which the United States is a party. As every male child born in the United States to citizens of this country can aspire to be president, so every suitor, however lowly, can expect to have his controversy passed upon by the Supreme Court of the United States if the requisite federal question is involved, and is raised in the proper manner and appellee, with her pious wish, inferred in her Point II of her typewritten Statement and expressed on page 25 thereof should be referred to some Court behind the Iron Curtain and not to a Court whose function was explained by Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheaton 316, in the words we have just quoted.

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[15]United States Constitution, Article III, Section 1, Appendix page xxvi.

[16]United States Constitution, Article III, Section 2, Appendix page xxvi.

THE CASE OF COOKE v. COOKE UPON WHICH THE LOWER COURT PRINCIPALLY RELIED IS NOT IN POINT.

The basis of the lower court's decision is the case of *Cooke v. Cooke*, 65 Cal. App. (2d) 260. (R. 31, 79, 89 A.C.A. 865, 201 Pac. (2d) 842-843.) In that case there had been a gift of an insurance policy by a husband to his wife followed by a divorce. The policy was not considered by the Court in the divorce proceedings nor mentioned in the decree but it was contended on behalf of the second wife after the husband's death that the divorce decree plus the Arkansas statute had had the effect of transferring the policy back to the husband.

This statute provided that when the husband obtained a divorce that an order should be entered restoring to each party all property which either party had obtained from the other during the marriage and in consideration or by reason thereof.

With nothing appearing but that a valid gift had been made of an insurance policy and thereafter a divorce decree entered which did not mention the policy the decision of the California Court dividing the proceeds between the two wives on the basis of the premiums paid before and after the second marriage was justified under California law and the Court in the *Cooke* case did not need to go further. All the rest of the discussion is mere dicta.

It was claimed however that the Arkansas statute was self executing and that by reason of that fact that the husband became the owner of the policy and his change of beneficiary to his estate was effective. The

Court compared the Arkansas statute and the Kentucky statute and found that the latter statute was self executing except in two cases and did not find that the Arkansas statute was intended to be self executing. If it had found that the Arkansas statute was not self executing it would have arrived at the conclusion it reached without the need of further discussion.

It held, however, that the Arkansas statute could not apply, if intended to be self executing, because to apply it would have the effect of depriving plaintiff of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and California Constitution, Art. I, Sec. 1. If this statement was intended to refer to anything other than procedural due process—the right of notice and an opportunity to be heard—it is error. Under California law and the law of every state in the Union where divorces can be obtained, a Court granting a divorce can divide some species of property acquired during the marriage between the parties. We must assume, therefore, that all the Court in the *Cooke* case was referring to, up to that point, was the doctrine of procedural due process. In this it was correct and the *Cooke* case was properly decided.

The Court went on, however, and said:

> "It has been repeatedly and consistently held by the California courts that the legislature has no constitutional power to deprive a person of property by means of a legislative enactment."

The usual and better statement of the rule is that the legislature can not take the property of one man and give it to another, since the legislature can, of course, deprive a person of property by use of the taxing power and also the police power. As we have already said, this statement is not necessary to the decision—it is mere dicta. The Court had already found that there had been a valid gift of the policy and that the divorce Court had not attempted to make any change in the title to it. It could have stopped there and its decision would have been complete. It could have said that it didn't find any indication of an intention of the Arkansas legislature to accomplish a change automatically and that would have ended the matter. It could have said that a legislative fiat cannot by itself transfer the property of A to B.

The *Cooke* case, and its highly interesting problems, however, cannot help us in the case at bar, no matter what it says.

In the first place the *Cooke* case is dealing with an insurance policy of a private company—with property created by a state and subject to the laws of the state. In the case at bar, the contract of insurance is of a special kind. It is a contract between the federal government and a member of the armed forces. The federal government can make any contract with a soldier it desires and the states can say nothing about it since the people in the Constitution have given Congress the power to pass laws to govern the armed forces.

In the second place the *Cooke* case is concerned with a state law that is attempted to be applied to change

title to a policy that at one time was admittedly owned by the first wife by reason of a gift. In the case at bar, the state law is attempted to be applied to give the wife rights in a policy that by its terms she doesn't have and never had.

In the third place, in the *Cooke* case the state law is not operative because it is in conflict with the supreme law of the land—the Fourteenth Amendment. In our case the state law is not operative because it is in conflict with the supreme law of the land—an Act of Congress passed in conformity with the Constitution of the United States.

In the fourth place, the *Cooke* case is concerned with a policy at one time owned by the wife by the husband's act and now sought to be reclaimed by the husband's representatives and the help of a state law, which could have helped if it had been used in time, and the matter litigated in the divorce proceedings. In the case at bar the wife is attempting to get an interest in property which her husband never intended her to have and by use of a state law that makes him the manager of the community property and only gives her the right to reclaim property when he gives it away if she claims it before it reaches the hands of an innocent purchaser for value.

In the fifth place, in the *Cooke* case the husband's representative sought to use a state law to regain an interest in a policy on his life and without success. In the case at bar, when the wife seeks to use a state law to get an interest in an insurance policy to be perfectly analogous her efforts should likewise be

without success. The state law is found inadequate to reverse a husband's gift of an insurance policy in the *Cooke* case and to be analogous the state law in the case at bar should also be found inadequate. Instead of being cited against our contention as the Court has used it, the case should be cited for our contention.

In the sixth place, the *Cooke* case is concerned with a state law which, if properly applied, could have accomplished the ends which it was claimed it had done. The federal government had not passed a statute that would have prevented the Arkansas Court from awarding the policy involved to the husband. In the case at bar the Congress of the United States has said in effect:

> Keep your hands off all moneys we pay to the beneficiaries named in this policy.

The *Cooke* case does not justify the lower court's decision in the case at bar.

SUMMARY.

SHORT ANSWERS TO SHORT STATEMENTS.

1.

Appellee: "This is not a suit in which the United States is involved as a party." (p. 23.)

Appellants: "The same rules of law should be applied to determine the rights of the claimants to the proceeds of a National Service Life Insurance policy in the state court as are applied in the federal courts when the United States is a party."

2.

Appellee: "The validity of the Congressional Act is not questioned and the holding in the case does not conflict with it in any way." (p. 23.)

Appellants: "The lower court being otherwise unable to avoid the clear, plain meaning of the provisions of the federal act held that the Congress did not have the power under the Tenth and Fifth Amendments to pass the act it passed."

3.

Appellee: "Appellants' only contention is that this court has jurisdiction because Section 454A contains the language:

> 'benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever'

and as shown by this statement the courts have established that this language does not mean what appellants contend and that the proceeds are subject to court process and to seizure and to sequestration for the protection of certain rights." (p. 23.)

Appellants: "This court has jurisdiction of the case by certiorari and by appeal because the lower court refused to apply the provisions of the act quoted and held they were unconstitutional. No reported case agrees with the lower court on the constitutional question and that court expressly disagrees with the federal court sitting in the state and scores of other cases cited to the lower court and ignored by it. All courts, including the lower court, construe the federal statutes

and the state statutes involved in this case as being in direct conflict and repudiate the construction contended for by appellee."

4.

Appellee: "The language of Section 454a was intended to apply to *claims* and to creditors." (p. 23.)

Appellants: (A) The statute expressly exempts the proceeds from taxation from the claims of creditors *AND* from all other claims.

(B) The Congress intended the proceeds in the hands of the designated beneficiary to be exempt from all possible claims both before and after receipt by the beneficiary.

5.

Appellee: "The proceeds of the policy in question here are without question community property of the appellee and her deceased husband under the laws of California and are admitted to be such by the pleadings." (p. 24.)

Appellants: The pleadings admit that appellee and her deceased husband were married at all times in question and we admit that if these were the proceeds of a private life insurance policy that under the laws of the state of California appellee would prevail. Appellee's pleadings show that the insurance involved was taken out by her husband while in the Army and paid for by Army pay so her rights in the proceeds are only those agreed upon by her husband and the United States—nothing. *White v. United States,* supra; *Williams v. United States.*

6.

Appellee: "There is nothing in the language of 454a that seeks to take away the vested admitted community property right of the wife and every indication is that it was never intended that the statute go that far." (p. 24.)

Appellants: The plain meaning of the language used by the Congress is: "Payments of benefits * * * made to a beneficiary * * * shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary." What more could the Congress say?

7.

Appellee: "No court would uphold a secret agreement between a private individual and the husband depriving the wife of her interest in the proceeds of insurance."

"We do not believe the United States Government intended to enter into such a secret agreement and certainly no such agreement is necessary to the operation of the Veterans' Insurance Program." (p. 24.)

Appellant: The Congress intended to give each member of the armed forces the right to name the beneficiary of the insurance policy on his life, to change the beneficiary whenever he desired without permission of the beneficiary and to protect that beneficiary so named in the use of the proceeds of the insurance against any and all possible claims. The Congress had the power to so provide and the necessity,

propriety, wisdom or utility of such action is no concern of the courts.

8.

Appellee: "This court has already held that the act will not be construed to destroy the well recognized right of the United States government to include the proceeds of the policy in an estate for taxing purposes." (p. 24.)

Appellants: This was a tax on the transfer, the proceeds can not be taxed even after they have been deposited in a bank. *Lawrence v. Shaw*, supra.

9.

Appellee: "The logical conclusion from this holding is that the act will not be construed to destroy the well recognized vested property rights of women in California and other community property states." (p. 24.)

Appellants: There are no vested rights in the proceeds of a contract between a soldier and his government except those which the soldier and his government intend to be vested. *White v. United States*, supra; *Lynch v. United States*, supra.

10.

Appellee: "Courts have recognized that the funds are subject to seizure, process, and sequestration for alimony, support, and in guardianship matters. The interest of the wife provided in community property states is only an indirect method of providing ahead

of time for her support and care. Certainly it was not the intention of Congress to destroy this right." (p. 25.)

Appellants: The intent of the Congress as shown by the plain meaning of the words used and the whole scheme of the act is to give the insured in every state of the union the right to name the beneficiary of the insurance on his life and to protect that beneficiary in the use of the proceeds from any possible claim of any kind. The cases cited by appellee are opposed by more cases, more closely analogous cases and better reasoned cases. *"Hard cases make poor law."*

CONCLUSION.

No Court agrees with the decision of the lower court herein that an act of Congress passed pursuant to a delegated power is a violation of the Tenth Amendment and the due process clause of the Fifth Amendment because it announces different rules of property for a contract of the United States than the state rules applying to contracts between private individuals in the State.

There is a conflict between State and Federal Courts sitting in the state and between the lower court and Courts of other states and federal jurisdictions which can only be resolved by a decision of this Court.

The question is a novel one so far as this Court is concerned. It is one of great importance to thousands of people. The possibilities of increase in litigation

if the judgment of the lower court is not reversed are tremendous. This Court has jurisdiction both by certiorari and appeal. It is the function of the Supreme Court of the United States not only to determine controversies between the citizen and governmental agencies but also to determine controversies between private citizens which require the application of the appropriate rules of law contained in the Constitution of the United States.

The decision of the lower court violates the provisions of the Fourteenth Amendment and deprives appellants of property without due process of law by failing to apply the provisions of a federal act in violation of the supremacy clause of the United States Constitution.

This Court should exercise its jurisdiction, and reverse the judgment of the State Court.

Dated, Modesto, California,
June 17, 1949.

Respectfully submitted,
W. COBURN COOK,
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(Appendix Follows.)

Appendix

STATUTES.

Pensions, bonuses, veterans' relief.

38 U.S.C.A. Sec. 445. "Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Veterans' Administration acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the na-

ture of a bill of interpleader may be brought by the Veterans' Administration in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: *Provided,* That no less than thirty days prior to instituting such suit the Veterans' Administration shall mail a notice of such intention to each of the persons to be made parties to the suit. The circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall respectively exercise appellate jurisdiction and, except as provided in sections 346 and 347 of Title 28, the decrees of the circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall be final.

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs.

Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the ground that the claim was barred by the statute of limitations shall not be bar to the institution of another suit on the same claim. No State or other statute of limitations shall be applicable to suits filed under this section.

"In any suit, action, or proceedings brought under the provisions of this chapter, subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: *Provided,* That no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place holding the same without the permission of the court being first had upon proper application and cause shown. The word 'district' and the words 'district court' as used herein shall be construed to include the District of Columbia and the district court of the United States for the District of Columbia.

"Attorneys of the Veterans' Administration, when assigned to assist in the trial of cases, and employees

of the Veterans' Administration, when ordered in writing by the Administrator of Veterans' Affairs to appear as witnesses, shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

"Part-time and fee-basis employees of the Veterans' Administration, in addition to their regular travel and subsistence allowance, when ordered in writing by the Administrator of Veterans' Affairs to appear as witnesses in suits under this section, may be allowed, within the discretion and under written order of the Administrator, a fee in an amount not to exceed $20 per day.

"Employees of the Veterans' Administration who are subpoenaed to attend the trial of any suit, under the provisions of this chapter, as witnesses for plaintiffs, shall be granted official leave for the period they are required to be away from the Veterans' Administration in answer to such subpoenas.

"The term 'claim', as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter. June 7, 1924, c.

320, Sec. 19, 43 Stat. 612; Mar. 4, 1925, c. 553, Sec. 2, 43 Stat. 1302; May 29, 1928, c. 875, Sec. 1, 45 Stat. 964; July 3, 1930, c. 849, Sec. 4, 46 Stat. 992; July 3, 1930, c. 863, Sub. Sec. 1, 2, 46 Stat. 1016; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921."

38 U.S.C.A. 454a. "Assignability and exempt status of payments of benefits.

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims or creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. From and after October 17, 1940, this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary or his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating

to veterans, to such beneficiary or his estate or to his dependents as such: *Provided, however,* That if the benefits be insurance payable by reason of yearly renewable term or of the United States Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: *Provided further,* That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title. Aug. 12, 1935, c. 510, Sec. 3, 49 Stat. 609; Oct. 17, 1940, c. 893, Sec. 5, 54 Stat. 1195."

38 U.S.C.A. 514. "Payment of insurance to estate of deceased beneficiary; escheat to United States.

"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: *Provided,* That all awards of yearly renewable term in-

surance which were in course of payment on March 4, 1925, shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this chapter. When any person to whom such insurance was awarded prior to such date dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person: *Provided further,* That no award of yearly renewable term insurance made to the estate of a last surviving beneficiary prior to March 4, 1925, shall be affected by the foregoing provisions. In cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917. June 7, 1924, c. 320, Sec. 303, 43 Stat. 625; Mar. 4, 1925, c. 553, Sec. 14, 43 Stat. 1310."

38 U.S.C.A. 686c. "Adjusted-service certificates; time and manner of payment; issuance of bonds; interest; deceased or incompetent veterans; designation of postal employees as fiscal agencies; lost, stolen, or destroyed bonds.

"* * * Such bonds shall be issued under the authority and subject to the provisions of the Second Liberty Bond Act, as amended, and shall not be transferable, assignable, subject to attachment levy, or seizure under any legal or equitable process and shall be payable

only to the veteran or, in case of death or incompetence of the veteran, to the representative of his estate. * * * Jan. 27, 1936, c. 32, Sec. 4, 49 Stat. 1101; June 3, 1936, c. 482, Sec. 2, 49 Stat. 1396; June 26, 1936, c. 848, 49 Stat. 1982; Aug. 14, 1937, c. 628, 50 Stat. 641."

38 U.S.C.A. 802. "Person insurable; premiums; type of insurance; benefits and beneficiaries; effective date and amount of insurance—Persons entitled to insurance; persons entering service.

"(g) Beneficiaries. The insurance shall be payable only to a widow, widower, child (including stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: *Provided,* That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insurance policy maturing on or after August 1, 1946."

"(h) Manner of payment of benefits. Insurance maturing prior to August 1, 1946, shall be payable in the following manner:

"(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly install-

ments: *Provided*, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: *Provided further*, That in case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is directed to send, within one year after August 1, 1946, to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee.

"(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of ma-

turity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: *Provided further,* That such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months: *Provided further,* That in any case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is directed to send, within one year after August 1, 1946,

to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee.

"(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

(A) to the widow or widower of the insured, if living;

(B) if no widow or widower, to the child or children of the insured, if living, in equal shares;

(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;

(D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares."

"(i) Payment of benefits where beneficiary undesignated or dead.

"If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of

this section and the insurance shall be payable in equal monthly installments, shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) of this section. The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946."

"(j) Payment of benefits to heirs, etc., of insured or beneficiary; death of all permitted beneficiaries.

"No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, except that if the reserve of a contract of converted national service life insurance, together with dividends accumulated thereon, less any indebtedness under such contract, exceeds the aggregate amount paid to beneficiaries, the excess shall be paid to the estate of the insured unless the estate of the insured would escheat under the laws of his place of residence, in which event no payment shall be made. The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946." Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 602, 54 Stat. 1009; Dec.

20, 1941, c. 602, Sec. 10, 55 Stat. 846; Feb. 11, 1942, c. 69, 56 Stat. 88, as amended.

38 U.S.C.A. 804. "Appropriations for payment of liabilities; payments from.

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this chapter, to be known as the National Service Life Insurance appropriation, for the payment of liabilities under National Service Life Insurance. Payments from this appropriation shall be made upon and in accordance with awards by the Administrator. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part. I, Sec. 604, 54 Stat. 1011."

38 U.S.C.A. 805. "National Service Life Insurance Fund; creation; payments into and from; reserves; investments.

"(a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

"(b) The Administrator is authorized to set aside out of such fund such reserve amounts as may be re-

quired under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest such fund, or any part thereof, in interest-bearing obligations of the United States or in obligations guaranteed as to principal and interest by the United States, and to sell such obligations for the purposes of such fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 605, 54 Stat. 1012."

38 U.S.C.A. 806. "Administrative costs.

"The United States shall bear the cost of administration in connection with this chapter, including expenses for medical examinations, printing and binding, and for such other expenditures as are necessary in the discretion of the Administrator. The appropriations made for the Veterans' Administration for the fiscal year 1941 for administrative expenses shall be available for the payment of such costs of administration under this chapter. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 606, 54 Stat. 1012."

38 U.S.C.A. 807. "Costs of excess mortality and premium waiver; liability for benefits for death resulting from extra hazard of military or naval service.

"(a) The United States shall bear the excess mortality cost and the cost of waiver of premiums on account of total disability traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator.

"(b) Whenever benefits under such insurance become payable because of the death of the insured as

the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the liability for payment of such benefits shall be borne by the United States in an amount which, when added to the reserve of the policy at the time of death of the insured, will equal the then value of such benefits under such policy. Where life contingencies are involved in the calculation of the value of such benefits of insurance heretofore or hereafter matured, the calculation of such liability or liabilities shall be based upon such mortality table or tables as the Administrator may prescribe with interest at the rate of 3 per centum per annum. The Administrator is authorized and directed to transfer from time to time from the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to carry out the provisions of this section. As amended Aug. 1, 1946, c. 728, Sec. 11, 60 Stat. 788.

"(c) Whenever the premiums under such insurance are waived as provided in section 802 (n) because of the total disability of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the premiums so waived shall be paid by the United States and the Administrator is authorized and directed to transfer from time to time an amount equal to the amount of such premiums from the National Service Life Insurance appropriation to the National Service Life In-

surance Fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 607, 54 Stat. 1012, as amended."

38 U.S.C.A. 808. "General administrative provisions.

"The Administrator, subject to the general direction of the President shall administer, execute, and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this chapter as may be assigned to them by the Administrator. All official acts performed by such officers and employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator. Except in the event of suit as provided in section 817 of this title, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this chapter, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, except a judge or judges of United States courts, shall have jurisdiction to review any such decisions. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 608, 54 Stat. 1012. As amended Aug. 1, 1946, c. 728, Sec. 12, 60 Stat. 788."

38 U.S.C.A. 817. "Suits in event of disagreement as to claims.

"In the event of disagreement as to any claim arising under this chapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 618, 54 Stat. 1014. As amended July 11, 1942, c. 504, Sec. 6, 56 Stat. 659; Aug. 1, 1946, c. 728, Sec. 14, 60 Stat. 788."

CASES.

Nobles v. Cannell, Superior Court of State of California. In and for the County of Los Angeles, No. 502,587, Opinion, dated May 31, 1946.

"Plaintiff and William Cannell were married on February 22nd, 1942, and on the fourteenth of October of that year he was inducted into the United States Army. While in the army he contracted an incurable and fatal disease. His mother, Nettie Cannell, who is a trained nurse, learning that he was in an army hospital and that he could not get well took the plaintiff with her, went to where he was, and insisted on his being discharged from the service. When she accomplished this she brought him to her home and nursed him there. Defendants advanced $280.00 to the plaintiff for the trip to get the veteran and there was

paid by them the sum of $1169.19 for hospital bills, drug bills, doctor bills and for blood donors for the veteran, and in addition they paid $91.00 in premiums on an insurance policy of the veteran's, other than the policy involved in this suit. There was evidence as to what nursing and care for the veteran would have cost in a private hospital but none as to what it would have cost in a private home such as that involved here. The amount of money advanced and bills paid for the veteran and the value of services rendered him by defendants is only material in so far as it goes to show that there could have been a valid consideration for anything of value turned over to defendants by the veteran. William Cannell died October 28th, 1944. Not by way of minimizing what the veteran's parents did for him but simply in passing it may be well to point out that there is no evidence that the veteran was not receiving every care in the government hospital and that this care would not have continued. Also it may be remembered that the idea of taking William out of the government hospital, having him discharged, and of bringing him to his parents' home and of caring for him there was the idea of the veteran's mother, and regardless of how worthy her actions, the fact remains that she treated him and his wife just as if he were still her unmarried son.

"On the first of August, 1943, a life insurance policy in the sum of Ten Thousand Dollars was issued to the veteran by the National Service Life Insurance, in which plaintiff, his wife, was named as sole beneficiary. To pay the premium on the policy William

Cannell authorized the deduction of seven dollars per month from his army pay, commencing August 1st, 1943, and continuing thereafter; the premium from August 1st, 1943, to July 31st, 1944, being paid under this authorization. On July 3rd, 1944, William Cannell was given a medical discharge from the army, at his mother's insistence, and the premiums on the policy for the months of August, September and October, 1944, were paid by defendants. On the 11th of July, 1944, the insured veteran executed a request for change of beneficiaries on the life insurance policy, in which he designated his wife, Marion Louise Cannell, and his daughter, LeDean May Cannell, principal beneficiaries in equal shares of Five Thousand Dollars each. On the 8th of August, 1944, the beneficiaries on the policy were again changed and this time the serviceman's daughter and mother were designated as the sole beneficiaries in equal shares of Five Thousand Dollars each, and this is the way the beneficiaries of the policy stood at the date of the death of William Cannell. The policy was granted under the National Service Life Insurance Act of 1940, which insurance is administered by the Veterans' Administration. * * *

"Coming now to the question of the insurance policy the first question presented is: 'has this Court jurisdiction to determine the property rights in this policy?' The object of the law providing that suits may be brought in the Federal Court was for the protection of the Veterans Bureau and the Government, it was to protect the United States Government from

having to litigate in all the different state courts of the United States. In other words it had application only where the United States was a party to the suit. This is demonstrated by the case of United States v. Pfitsch, 256 U.S. 547, wherein it is stated: 'Furthermore it is significant that this is not the only occasion upon which Congress has provided for *suits against the United States exclusively in the District Court, etc.*' This is not a suit against the United States. The Court therefore determined that it has jurisdiction of this suit which is between citizens of this state concerning the establishment of a trust in the proceeds of a war risk insurance policy. The United States can be forced to do only what it has agreed to do in the policy and it has agreed to pay the money to the named beneficiaries. However regardless of the fact that the United States can stand on its rights as expressed in the policy it does not have the right to say to the wife of a deceased veteran that regardless of the fact that the premiums were paid with community property that she shall not be entitled to insist that she receive a half of the proceeds of the policy on the death of her husband. This she does not get by reason of being designated as a beneficiary but by reason of the fact that the policy is purchased with community money. The policy is not a gratuity, Lynch v. U. S., 292 U.S. 570. Although the insurance contract was not entered into by the U. S. for gain it nevertheless charges for the same—the soldier is simply permitted to buy insurance for a rate much less than that charged by private companies. Nor does this Court consider the field in which it

might be said what a soldier can buy with his money and to whom the purchased article would belong as a field which the Federal Government is entitled to occupy exclusively. The object of the insurance is primarily the protection of the soldier and his dependents and certainly the wife of the soldier falls within this classification. The earnings of a married soldier are, under the laws of the State of California, community property. If they are used to buy a war risk insurance policy for a reduced rate—the policy is community property—and to permit the soldier to give the proceeds away, in case of his death, to the exclusion of his wife, would permit him to make a gift of the wife's half of the community property. Coming now to the question of whether or not the designation of the mother of the veteran as being entitled to one-half of the policy constituted a gift to her, we find that she testified that she did not expect to be paid for the services to her son, but that she expected something from the daughter-in-law and that she rendered the services because of the love and affection she bore her son. This would not indicate that as stated in the case of Crane v. Derrick, 157 Cal. 667, the circumstances were such that it warranted the inference that it was the expectation of both parties that compensation should be made. Such a situation as results from the defendant's testimony would negative the idea that the services should be considered a valuable consideration for the making of Nettie Cannell the beneficiary of one-half of the insurance policy. On the 8th of August, 1944, when the last change of beneficiaries was made there was very little indebted-

ness owed by the veteran to Nettie Cannell, so this could not be held to be a valuable consideration. In this connection it may be pointed out that as a beneficiary of the insurance policy she would receive money that would not be community property of herself and husband. The veteran was entitled to give away one-half of the benefits of the policy. He attempted to give it all away—one-half to his daughter and one-half to the defendant. This he was not permitted to do. If all of the facts and parties were properly before this Court which would entitle it to make a decision on the question of the life insurance and who was entitled to it the Court would hold that the plaintiff was entitled to a one-half of the policy, the defendant to a one-fourth of the policy and the veteran's daughter a one-fourth of the policy. This decision would be arrived at by reasoning that when the soldier designated the daughter as entitled to one-half and the defendant as entitled to one-half he gave away wrongfully the one-half interest of the wife—and that since she was entitled to a one-half the interest of each of the other parties would have to be reduced to a fourth. The Court feels that when the beneficiaries of a policy are changed the mere fact that one was a beneficiary before the change and was again made a beneficiary after the change would not give him any more rights than if they had not been mentioned in the first place. The decision above-mentioned which the Court would make if all parties and facts were properly before it the Court would carry out by designating the recipients of the insurance money as trustees for the plaintiff to the extent that

they should pay over to her of what they received that proportion which would give her a one-half of the insurance money. However the Court finds that it can make no decision on the insurance money under the state of the pleadings, etc. because the daughter is not a party to this suit and before a determination could be made which would of necessity affect the rights of the daughter she would have to be represented. Unless appropriate steps can be taken to remedy this situation the Court will be required to find for defendant in regard to the insurance money.

"Attorney for plaintiff to prepare findings of fact and conclusions of law and judgment in accordance with the view expressed in this opinion.

"Dated this 31st day of May, A.D., 1946.

Ben V. Curler
Judge of said Superior Court."

Nobles v. Cannell, Superior Court of State of California, In and For County of Los Angeles, No. 502,587, Judgment, Dated October 27, 1948.

"This cause came on regularly for trial before the above entitled court in Department No. 46, on the thirty-first day of October and the first day of November, 1946, the Honorable Ben V. Curler, Judge presiding, the plaintiff appearing in person and by Reynolds and Painter, her attorneys, and the defendants appearing in person, and by Earle Stuart Rhode and Earl Blodgett, their attorneys. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury, whereupon witnesses on the part of plaintiff

and defendants were duly sworn and examined, and documentary evidence introduced by the respective parties; and the evidence being closed, the cause was submitted to the court for consideration and decision. On May 31, 1947, an opinion was rendered in which attention was called to the fact that LeDean Mae Cannell whose name is now LeDean Mae Nobles had not been made a party to this action, and on November 14, 1947, an order was made to permit plaintiff to file an instrument designated 'Consent and Waiver', which was then done. That on September 13, 1948, in Department No. 30, of the above entitled court, the Honorable Ben V. Curler, Judge presiding; Louis Miller appearing for Reynolds and Painter, attorneys, on behalf of plaintiff; Earle Stuart Rhode appearing on behalf of defendants; and Robert Komins, Assistant United States Attorney, appearing for United States of America, Amicus Curiae; and the law as to the facts in evidence having been duly presented and argued; and the court having considered the same, and being fully advised in the premises, the court files its findings of fact and conclusions of law in writing, and orders that judgment be entered in favor of plaintiff against defendant Hugh Cannell, and in favor of defendant Nettie Cannell against plaintiff in accordance therewith.

"Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that Marion Louise Cannell Nobles, the plaintiff do have and recover, of and from Hugh Cannell, defendant, the sum of Two Hundred Nine and twenty-nine hundredths Dollars ($209.29), with interest thereon, at

the rate of seven per cent, per annum, from the date hereof until paid.

"It is further hereby ordered, adjudged and decreed that the entire proceeds of the policy of national service life insurance issued on the life of William Edmond Cannell in the face amount of Ten Thousand Dollars ($10,000.00) are payable and awarded to defendant Nettie Cannell, born June 8, 1879, as sole beneficiary as to Five Thousand Dollars ($5,000.00), and to LeDean Mae Cannell whose name is now LeDean Mae Nobles, born February 22, 1943, as sole beneficiary as to Five Thousand Dollars ($5,000.00), duly registered with the Veterans Administration as to said policy, all under the terms and conditions of said policy and as provided therein, and that said defendant Nettie Cannell and LeDean Mae Cannell whose name is now LeDean Mae Nobles, as beneficiaries so registered as to said policy and as their interest may appear therein, are entitled to receive all of the proceeds and benefits of said policy.

"It is further hereby ordered, adjudged and decreed that defendant Nettie Cannell, do have and recover her costs and disbursements incurred herein, in the sum of $6.50 and may have execution issued therefor.

"Dated this 27th day of October, 1948.

Ben V. Curler,
Judge of Superior Court."

Article III, Sec. 1.

"The judicial Power of the United States, shall be vest in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."